Supreme Court, U.S.
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91-110

CASE NO.:

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

HERBERT W. FIELDS, JR.
Petitioner

v.

HARTFORD CASUALTY
INSURANCE COMPANY
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the lower court erred in determining a bankruptcy claim to be nondischargeable in favor of Respondent, Hartford Casualty Insurance Company by its being subrogated under state law to the claim of the State of Texas for taxes which Respondent paid as a surety under a bond contract with Petitioner, thereby upholding the state doctrine of subrogation over the provisions of the United States Bankruptcy Code, and the Constitution of the United States. The split of authority among three circuit courts of appeals has dictated the necessity to bring this issue before this court for final resolution.

LIST OF ALL PARTIES

I certify that the following comprise all interested persons known to Petitioner:

Herbert W. Fields, Jr., Petitioner
Attorney: Michael J. Pledger
Pledger & Pledger
Houston, Texas

Hartford Casualty Insurance Company, Respondent
Attorney: Gary Wickert
Hughes, Watters and Askanase
Houston, Texas

Michael J. Pledger

MICHAEL J. PLEDGER
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CONSTITUTIONAL PROVISIONS, STATUTES & RULES

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11 U.S.C. Section 523(a)(1)(A) p. 14,15 16,17

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House Report No. 95-595, 95th Cong. 1st Sess. 363 (1977) p. 17-18

Senate Report No. 95-989, 95th Cong. 2d Sess. (1978) p. 18

OFFICIAL COURT OPINIONS

The United States Bankruptcy Court for the Southern District of Texas issued its Memorandum Opinion and Order signed March 15, 1989, determining Hartford's claim to be nondischargeable.

The United States District Court for the Southern District of Texas affirmed the decision on July 12, 1990, and the Fifth Circuit Court of Appeals also affirmed the decision on March 21, 1991.

STATEMENT OF JURISDICTION

This Petition for a Writ of Certiorari is sought from a final order of the United States Court of Appeals, Fifth Circuit, issued March 21, 1991, and is herein filed within the required ninety (90) day period.

This court has jurisdiction pursuant to 28 U.S.C. Section 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. CONST. Art. I, Section 8, cl. 4.

"The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform througout the United States;

(4) To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;"

U.S. CONST. Art. VI, Section 2.

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the

Judges in every State shall be be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

11 U.S.C. Section 523(a)(1)(A)

"A discharge under section 727, 1141, 1228(a), 1228(b) or 1328(b) of this title does not discharge an individual debtor from any debt -

(1) for a tax or a customs duty -

(A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(7) of this title, whether or not a claim for such tax was filed or allowed;"

11 U.S.C. Section 507(a)(7)

"The following expenses and claims have priority in the following order:

...(7) Seventh, allowed unsecured claims of governmental units; only to the extent that such claims are for -"

STATEMENT OF THE CASE

This is an appeal from a final order signed by the Fifth Circuit Court of Appeals on March 21, 1991 affirming the decision of the Bankruptcy Court and District Court in determining the claim of Hartford Casualty Insurance Company to be nondischargeable.

FACTS

The Petitioner, Herbert W. Fields, Jr. (Fields) filed his Chapter 11 case on December 28, 1984, and properly scheduled Hartford Casualty Insurance Company (Hartford) as a creditor.

Hartford issued a surety bond covering a mixed beverage permit to Fields as the owner of corporations known as Corky's Country and Carlos' 'N Charlies Del Norte, Inc. The surety agreement bound Fields as principal and Hartford as

surety to the rights of the State of Texas for payment of all fees, taxes and penalties levied by the Texas Alcoholic Beverage Commission. Fields filed a Chapter 11 bankruptcy petition on December 28, 1984. During the periods of December 28, 1984 to October 16, 1985 and February 19, 1985 to October 2, 1985, Fields failed to pay taxes covered by the surety bonds. Pursuant to the surety bond requirements, Hartford paid $15,479.58 to the State on November 21, 1985. This case was converted to a Chapter 7 case on October 29, 1986.

The Chapter 7 Creditors' Meeting was noticed and held on December 16, 1986, and the deadline for filing complaints to determine dischargeability under 11 U.S.C. 523(c) was established as February 16, 1987.

Hartford filed a Complaint to

Determine Dischargeability of Debt on February 9, 1988, nearly one year after the bar date.

Petitioner filed his Motion to Dismiss Complaint on March 9, 1988, and accompanying Memorandum of Law.

The Bankruptcy Court issued its Memorandum Opinion and Order signed March 15, 1989 determining the claim of Hartford Casualty Insurance Company to be nondischargeable under 11 U.S.C. Section 523(a)(1)(A).

The Petitioner brought an appeal from that order on the grounds that the debt was not automatically non-dischargeable as taxes pursuant to 11 U.S.C. 523 (a)(1)(A), and that under any other theory said complaint was not timely filed. The Petitioner asserted that any debt which was owing to Respondent, Hartford, was on account of a contractual relationship by

way of indemnity agreements, and is therefore not for taxes and not automatically nondischargeable as taxes, and is therefore subject to the time limitations of Bankruptcy Rule 4007 if nondischargeability is sought under an alternate theory. The District Court issued its Order signed July 12, 1990 affirming the Bankruptcy Court's decision and the Fifth Circuit Court of Appeals affirmed by Order dated March 21, 1991.

ARGUMENT

Petitioner respectfully requests that this court grant a Writ of Certiorari in this case in order to resolve a split in authority among three (3) circuit courts of appeals. The Eleventh Circuit Court of Appeals has decided a case similar to the instant case and found that debt to be nondischargeable on the same basis as the Fifth Circuit in the instant case. Western Surety Co. v. Waite (In re Waite), 698 F.2d 1177 (11th Cir. 1983).

The Ninth Circuit Court of Appeals has held exactly the opposite, that federal bankruptcy law controls and that the debt is dischargeable unless it is owed to the taxing authority itself and cannot be held nondischargeable to another party on a state law subrogation theory. National Collection Agency, Inc. vs.

Trahan, 624 F.2d 906 (9th Cir. 1980).

Therefore, not only does this case present the issue of whether federal bankruptcy law or state law is the controlling authority in United States Bankruptcy Court, but also gives this court the opportunity to settle this issue of federal bankruptcy law in a manner which will make the law consistent throughout the United States.

Section 523(a)(1)(A) of the Bankruptcy Code reads as follows:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--
>
> (1) for a tax or a customs duty--
>
> (A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(7) of this title, whether or not a claim for such tax was filed or allowed;

The type of taxes in question here are then found to be of a nondischargeable nature by referring to Section 507(a)(7).

Respondent is a creditor of the Petitioner by virtue of two (2) surety bonds issued by Respondent in favor of the State of Texas on which they now claim to have paid $15,479.58. Said payments were made on account of taxes, penalties, and other fees levied by the Texas Alcoholic Beverage Commission in regard to a mixed beverage permit held by Petitioner's corporations. Respondent is a private corporation and is in no way a government entity. Respondent, therefore, has no right to levy taxes of any kind nor would any debt owed to Respondent be nondischargeable pursuant to Section 523(a)(1)(A) of the Bankruptcy Code. This type of contract entered into by Hartford and Fields is in the ordinary course of business of Hartford and no doubt the fees it charges for such a service are geared to cover all losses which may be incurred

through this type of bond and still ensure a profit.

Hartford now claims to hold the same nondischargeable status pursuant to 11 U.S.C. Section 523(a)(1)(A) as a government entity due to its claimed status as a subrogee under state law. However, any state law contrary to federal bankruptcy law must yield. National Collection Agency, Inc. vs. Trahan, supra.

The right to regulate bankruptcy law has been specifically granted to the federal government. U.S. CONST. Art I, Section 8, cl. 4. Any attempt by a state to circumvent that grant and exercise of authority by Congress through the Bankruptcy Code must not be allowed. The doctrine of subrogation is said to be only a "legal fiction" by force of which an obligation, extinguished by payment by a third party, is treated as still existing

for benefit of that third party. First National Bank v Ackerman (1888), 70 Tex 315, 8 SW 45. Elements of that doctrine have been codified by the State of Texas. Texas Business and Commerce Code Section 34.04. To allow a state to define "taxes" to include the obligation of a private for-profit corporation in derogation of the clear meaning and intent of Section 523(a)(1)(A) of the Bankruptcy Code, is to frustrate the intent of Congress to protect tax revenues to governmental bodies, and to impermissably delegate a federal constitutionally mandated power to the states. The intent of Congress at the time of enactment to protect taxes (rather than subrogees to claims for taxes) is clearly shown in the legislative history.

"Subsection (a) lists eight (ten as amended by Pub. L. No. 98-353) debts excepted from discharge. Taxes that are entitled to priority are excepted from discharge under paragraph (1). In

addition, taxes with respect to which the debtor made a fraudulent return or willfully attempted to evade or defeat, or with respect to which a return (if required) was not filed or was not filed after the due date and after one year before the bankruptcy case are excepted from discharge. If the taxing authority's claim has been disallowed, then it would be barred by the more modern rules of collateral estoppel from reasserting the claim against the debtor after the case was closed. See Plumb, The Tax Recommendations of the Commission on the Bankruptcy Laws: Tax Procedures, 88 Harv. L. Rev. 1360, 1388 (1975)" House Report No. 95-595, 95th Cong. 1st Sess. 363 (1977)

"Subsection (a) lists nine kinds of debts excepted from discharge. Taxes that are excepted from discharge are set forth in paragraph (1). These include claims against the debtor which receive priority in the second, third and sixth categories (sec. 507(a)(3)(B) and (C) and (6). These categories include taxes for which the tax authority failed to file a claim against the estate or filed its claim late. Whether or not the taxing authority's claim is secured will also not affect the claim's nondischargeability if the tax liability in question is otherwise entitled to priority." Senate Report No. 95-989, 95th Cong. 2d Sess (1978)

The legislative history speaks only of claims by taxing authorities. No evidence of any kind is shown to evince an

intent to protect debts to private insurance companies from discharge through state law subrogation theories.

Futhermore, the doctrine of subrogation is not a matter of strict right but is purely equitable in nature, dependent upon the facts and circumstances of each particular case and where the result would not be adverse to public policy. In re Alloway, 37 B.R. 420 (E.D.PA. 1984); In re Smothers, 60 B.R. 733 (W.D.KY. 1986).

The overall legislative purpose for the Bankruptcy Code favors the discharge of debts and to provide a "fresh start". National Collection Agency, Inc. vs. Trahan, supra; In re Smothers, supra. "....exceptions to dischargeability are to be strictly construed against an objecting creditor and in favor of the debtor's right to discharge." In re Morris, (N.D.

Iowa 1981). To deny dischargeability of the claim of Respondent, Hartford Casualty Insurance Company, would place such a financial burden on the Petitioner, Herbert W. Fields, Jr., as to defeat the general intent and purpose of the Bankruptcy Code.

The burden of proving exception to discharge is on the party seeking such relief. In re Alloway, supra. The Respondent, Hartford, relies on the case of Gilbert v. United States Fidelity and Guaranty Company, 180 F. Supp. 794 (M.D. Ga. 1959), aff'd per curiam, 274 F.2d 823 (5th Cir. 1960) as having a similar fact situation decided in the Fifth Circuit and the Fifth Circuit Court agreed. However, this ruling was decided almost thirty (30) years ago under the old Bankruptcy Act. In light of current conflicting case law under the new Bankruptcy Code, this court

may choose to weigh the facts of the instant case pursuant to current public policy, current cases, and the general intent and purpose behind the more liberal Bankruptcy Code, and thereby render a decision in favor of the Petitioner.

The policy behind statutory exception to dischargeability of tax debts "is to promote the collection of taxes". In re Smothers, supra; Trahan, supra. Respondent, Hartford, is an insurance company, not a taxing authority, and having admitted that the taxes have been paid to the State of Texas, to render a determination as requested by the Respondent would not promote the collection of taxes since the debt to the state has been satisfied. Petitioner recognizes the need to promote the collection of taxes, which are the primary source of revenue government entities have

to provide the necessary services for the public. However, the debt under consideration is clearly not taxes, but is the result of a contractual relationship to Respondent by way of indemnity. This contract was entered into in the ordinary course of business by Respondent and was freely negotiated by both parties. Respondent is an entity incorporated for the purpose of profit-making pursuits, whose primary source of income is from the collection of premiums from those who seek its insurance services (and investment of profits). Respondent has assumed the risk of profit and loss as an entrepreneur, and has the option of increasing rates charged to its customers to recover the costs of doing business. To rule against the Petitioner by not allowing discharge of the debt, would place an extreme financial burden and

hardship contrary to the federal bankruptcy policy favoring the discharge of debts and the "fresh start" the Bankruptcy Code provides, and elevate state law subrogation over the clear language and intent of the Bankruptcy Code. The Ninth Circuit Court of Appeals stated this position well in the case of National Collection Agency, Inc. vs. Trahan, supra. In a footnote in Trahan, the court recognized that the cost of sureties may increase by this holding, but noted that his decision would in no way adversely affect the collection of taxes. The court held steadfast to the overriding policy favoring dischargeability of debts, and upheld the supremacy clause of the Constitution of the United States, U.S. CONST. Art. VI, Section 2, by declining to override the federal Bankruptcy Code and impose the state law theory of equitable

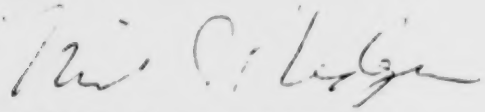
subrogation.

"....the determination of dischargeability is a federal question and must be based upon whether the debt actually possesses the characteristics of a tax." In re Beaman, (D.Oregon 1980). There is no question that the debt due the State of Texas was a tax. However, the debt due Appellee, Hartford, is a contractual debt of indemnity, where Appellee bases its right to dischargeability by the doctrine of subrogation as provided by state law.

CONCLUSION

The federal Bankruptcy Code and its provisions enacted pursuant to constitutional mandate must be upheld in light of the legislative intent and clear purpose of its discharge provisions. To allow state law to control the definition of "taxes" and therefore control the issue of dischargeability of debts, is to render the federal power impotent and to allow the several states to impermissably control the discharge provisions by enacting whatever definitions of "taxes" that they see fit. Petitioner, Herbert W. Fields, Jr., prays this court to grant certiorari, reverse the decision holding the debt to Respondent, Hartford Casualty Insurance Company, nondischargeable, and render judgment finding said debt to be discharged.

Respectfully submitted,



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APPENDIX

Exhibit 1	U.S. Bankruptcy Court Order Signed 3/15/89
Exhibit 2	U.S. District Court Order Signed 7/12/90
Exhibit 3	U.S. Court of Appeals, Fifth Circuit, Order Signed 3/21/91

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	)	
	)	
HERBERT W. FIELDS, JR.	)	CASE NO. 84-06303-H1-7
	)	
Debtor	)	
	)	
HARTFORD CASUALTY INSURANCE COMPANY	)	
	)	
Plaintiff	)	
	)	
VS.	)	ADVERSARY NO. 88-0109-H1
	)	
HERBERT W. FIELDS, JR.	)	
	)	
Defendant	)	

ORDER

After careful consideration of all pleadings, memoranda and authorities of law, the motion to dismiss the complaint is denied. The Claim of Hartford Casualty Insurance Company in the amount of $15,479.58 is determined to be nondischargeable. Attorney fees and costs are awarded to Hartford.

EXHIBIT 1

Signed this the 15th day of March, 1989.

/s/
MANUEL D. LEAL
UNITED STATES
BANKRUPTCY JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

IN RE:	)	
	)	
HERBERT W. FIELDS, JR.,	)	CIVIL ACTION
	)	NO. H-89-1351
Debtor.	)	Bkcy. No.
	)	84-06303-H1-7
	)	Adversary No.
	)	88-0109-H1

ORDER

Debtor, Herbert W. Fields, Jr. (hereafter "Fields") has appealed the order of the Bankruptcy Court granting nondischargeability of a tax debt paid by a contractual surety, Hartford Casualty Insurance Company (hereafter "Hartford"). The Bankruptcy Judge's Order shall be affirmed.

Hartford issued a surety bond covering a mixed beverage permit to Fields as the owner of corporations known as Corky's Country and Carlos' 'N Charlies

Del Norte, Inc. The surety agreement bound Fields as principal and Hartford as surety to the rights of the State of Texas for payment of all permit fees, subrogating service fees, taxes and penalties leveraged by the Texas Alcoholic Beverage Commission. Fields filed a Chapter 11 bankruptcy petition on December 28, 1984. During the periods of December 28, 1984 to October 16, 1985 and February 19, 1985 to October 2, 1985, Fields failed to pay taxes covered by the surety bonds. Pursuant to the surety bond requirements, Hartford paid $15,479.58 to the State on November 21, 1985. This case was converted to a Chapter 7 case on October 29, 1986.

The first issue before the Court is whether the claim for the debt is barred. Under 11 U.S.C. Section 348(d), claims arising prior to conversion are treated as

prepetition, with the exception of administrative claims. The debt for taxes arose prior to the conversion of the case to a Chapter 7 claim. Therefore, the claim of Hartford is treated as a prepetition claim, and is not barred.

The second issue before the court is whether the debt owed to Hartford for taxes paid pursuant to a surety agreement is dischargeable under the Bankruptcy Code. Under Section 523(a)(1)(A) of the Bankruptcy Code, a discharge under Sections 727, 1141, 1228(a), 1228(b), or 1328(b) of Title 11 does not discharge an individual debtor from any debt for a tax of the kind and for the period specified in Section 507(a)(2) or 507(a)(7) of Title 11. The Fifth Circuit has held that a surety which pays a debtor's tax liability is subrogated to the right of the taxing entity to prevent a discharge of the tax

debt under federal bankruptcy law. Gilbert v. United States Fidelity & Guaranty Co., 274 F.2d 823 (5th Cir. 1960), aff'd, 180 F. Supp. 794 (M.D. Ga. 1959).

The Eleventh Circuit adopted the reasoning of Gilbert in In the Matter of Waite, 698 F.2d 1177 (11th Cir. 1983). Under similar facts, a surety paid an alcoholic beverage tax for a principal who later filed for bankruptcy. The court ruled that a surety which paid a debtor's liquor sales tax liability to the state of Tennessee was subrogated to the right of the taxing entity to prevent discharge of the tax debt under the Bankruptcy Code. This Court follows the opinion of the Eleventh Circuit in Waite.

In addition, the principle of subrogation has been recognized in Texas courts. The Supreme Court of Texas has

held that if a surety or party in the position of a surety pays the debt of the principal, the surety is subrogated to all of the rights, remedies, equities, and securities of the creditor and can bring an action on the debt itself against the principal. Crimmins v. Lowry, 691 S.W.2d 582 (Tex. 1985). As a result the Court finds the debt owed by Fields to Hartford for taxes paid pursuant to the surety agreement are nondischargeable under the Bankruptcy Code. Therefore, it is

ORDERED that the Order of the United States Bankruptcy Court signed March 15, 1989 is AFFIRMED. It is further

ORDERED that there being no further pending dispute in this case, the appeal is DISMISSED.

IT IS SO ORDERED.

Signed this 12th day of July, 1990 at Houston, Texas.

/s/
NORMAN W. BLACK
UNITED STATES
DISTRICT JUDGE

In the Matter of Herbert W. FIELDS, Jr., Debtor.

HARTFORD CASUALTY INSURANCE COMPANY, Appellee,

v.

Herbert W. Fields, Jr., Appellant.

No. 90-2735
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

March 21, 1991.

Appeal from the United States District Court for the Southern District of Texas.

Before JOLLY, HIGGINBOTHAM, and JONES, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

The Debtor, Herbert W. Fields ("Debtor"), appeals from the district court's refusal to discharge a certain

EXHIBIT 3

debt to his surety, Hartford Casualty Insurance Co. ("Hartford"), incurred when Hartford paid taxes on his behalf to the State of Texas. The issue presented by this case is whether Hartford can be subrogated to the State of Texas' right to an exception from discharge under 11 U.S.C. Section 523(a)(1)(A)[1] of the Bankruptcy Code. Holding that Hartford is entitled to subrogation, we affirm.

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[1] Section 523(a)(1)(A) of the Bankruptcy Code provides:

> (a) A discharge under section 727, 1141, 1228(b), or 1328 (b) of this title does title does to discharge an individual Debtor from any debt-
>
> (1) for a tax or a customs duty
>
> (A) of the kind and of periods specified in section 507(a)(2) or 507(a)(7) of this title, whether or not a claim for such tax was filed or allowed;

I

The facts are brief and uncontested. Hartford issued a surety bond covering a mixed beverage permit to Debtor as the owner of two corporations known as Corky Country and Carlos' 'N Charlies Del Norte, Inc.[2] The surety agreement bound Debtor as principal and Hartford as surety to the rights of the State of Texas for payment of all fees, taxes and penalties levied by the Texas Alcoholic Beverages Commission ("TABC").

Debtor filed for bankruptcy protection in late December 1984. Subsequently, during the periods of December 28, 1984 to October 16, 1985, and February 19, 1985 to October 2, 1985,

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[2] Texas Alcoholic Beverage Code Section 204.01 (Vernon 1978 & 1991 Supp.) requires licensees and permittees of mixed beverages to furnish a bond to secure the payment of the gross receipts tax.

Debtor failed to pay taxes covered by the surety bonds. Pursuant to the surety bond requirements, Hartford paid $15,479.58 to the State on November 21, 1985.

II

On December 28, 1984, Debtor filed his Chapter 11 bankruptcy petition and properly scheduled Hartford as a creditor. The case was converted to a Chapter 7 case on October 29, 1986. The Chapter 7 Creditor's Meeting was noticed and held on December 16, 1986, and the deadline for filing complaints to determine dischargeability under 11 U.S.C. 523(c) was established as February 16, 1987. Hartford failed to file a Complaint to Determine Dischargeability of Debt until February 9, 1988, nearly one year after the bar date. Debtor filed his Motion to Dismiss Complaint on March 9, 1988.

The Bankruptcy Court denied Debtor's motion, determining that Hartford's claim was nondischargeable under 11 U.S.C. Section 523(a)(1)(A). Debtor appealed to the district court on the grounds that the debt was not automatically nondischargeable as taxes and that under any other theory Hartford's Complaint was not timely filed. The district court, however, affirmed the Bankruptcy Court's decision. Debtor timely appeals.

III

Initially, we note that if there had been no surety arrangement in this case and the claim was asserted by the State of Texas rather than Hartford, the debt would be nondischargeable under 11 U.S.C.

Section 523(a)(1)(A).[3] We must decide, however, whether a surety who pays a tax debt of another is subrogated to the State's right to an exception from discharge. As with all such claims, the party seeking an exception to discharge bears the burden of proof as to nondischargeability. In re Benich, 811 F.2d 943 (5th Cir.1987).

Debtor argues that the debt due Hartford arose as a result of an indemnity agreement, rather than as a tax. The tax

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[3] It is uncontested that the taxes in question in this case are nondischargeable pursuant to Section 507(a)(7). Section 507(a)(7), concerning priority of claims, lists a number of taxes including a "tax required to be collected or withheld and for which the debtor is liable in whatever capacity." The legislative history reveals that this category of taxes "includes excise taxes which a seller of goods is required to collect from a buyer and pay over to a taxing authority." S.Rep. No. 989, 95th Cong., 2d Sess. 71, reprinted in 1978 U.S.Code Cong. & Ad.News 5787,5857.

exception, according to Debtor, was promulgated to facilitate tax collection and because Hartford is not a taxing authority, this policy concern is not promoted by rendering Hartford's claim nondischargeable. Similarly, there is no need to protect the surety, argues the Debtor, as the fees charged by Hartford for the issuance of surety bonds are designed to protect Hartford against losses. Debtor concludes that because Hartford is not a taxing authority, it has no right to levy taxes and is not entitled to nondischargeability status under 11 U.S.C. Section 523(a)(1)(A). We are unpersuaded.

We last confronted this issue over thirty years ago in Gilbert v. United States Fidelity & Guaranty Co., 180 F.Supp. 794 (M.D.Ga.1959), aff'd per cuiam, 274 F.2d 823 (5th Cir.1960).

Gilbert is similar to the case at bar. Pursuant to a surety agreement, USF & G paid taxes due the State of Georgia that Gilbert had failed to pay. After Gilbert was adjudicated bankrupt, he sought a determination that the debt owed the surety was discharged in his bankruptcy. The district court, however, held that the surety benefitted from a Georgia subrogation statute, and the taxes were treated as still due for the benefit of the surety. Gilbert, 180 F.Supp. at 796. We affirmed the holding that under the Bankruptcy Act, a surety who pays a debtor's tax liability is subrogated to the taxing authority's status to prevent the discharge of a claim for unpaid taxes. 274 F.2d at 823.

Gilbert was decided, however, under the old Bankruptcy Act. Debtor argues that the adoption of the new Bankruptcy

Code permits us to reexamine this issue and, if warranted, to disregard Gilbert. We acknowledge that if the Bankruptcy Code created a substantive departure from the Bankruptcy Act on the issue of a surety subrogation to tax debts, we would be released, at least to a degree, from the precedential restraint of Gilbert. We believe that the adoption of the Bankruptcy Code, however, did not alter in any significant way, the bankruptcy law with respect to this issue.[4] We are therefore bound by our previous decision in Gilbert. See Ford v. United States, 618 F.2d 357, 362 (5th Cir.1980). As

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[4] Specifically, the Bankruptcy Act provided that a "discharge in bankruptcy shall release a bankrupt from...all of his provable debts...except such as (1) are due as a tax..." 11 U.S.C Section 35 (1964) (repealed). Section 523(a)(1) of the Bankruptcy Code states that a "discharge...does not discharge an individual debtor from any debt for a tax..."

stated in Gilbert, "it is as if the taxes themselves have not been paid and are still due and, of course, are not dischargeable in bankruptcy." 180 F.Supp. at 796. Accordingly, we hold that Hartford, having paid Debtor's taxes to the TABC, is subrogated to all the rights that the State of Texas had against Debtor under the Bankruptcy Code.[5]

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[5] Gilbert relied on a Georgia law that permitted subrogation. Similarly, we note that the principle of subrogation is well recognized in Texas. Texas law provides that a surety "is subrogated to all of the judgment creditor's rights." Tex.Bus & Comm.Code Ann. Section 34.04 (Vernon 1990). The Texas Supreme Court has also held that a surety is subrogated to all of the rights of the original creditor:

> Because the surety promises to pay the debt of another, equity confers the right of subrogation. If the surety or party in the position of a surety pays the debt of the principal, the surety is subrogated to all of the rights, remedies, equities, and securities of the creditor.
> Crimmins v. Lowry, 691 S.W.2d 582, 585 (Tex.1985).

The Eleventh Circuit has also concluded that our holding in Gilbert survives the adoption of the Bankruptcy Code. In In re Waite, 698 F.2d 1177 (11th Cir.1983), the surety made an identical claim as Hartford. The surety argued that it was entitled to be subrogated to the rights and standing of the State of Tennessee to assert nondischargeability under 11 U.S.C. Section 523(a)(1)(A) for unpaid liquor sales taxes of the kinds specified by 11 U.S.C. Section 507(a)(6).[6] The Eleventh Circuit agreed, holding specifically that Gilbert survived the enactment of the Bankruptcy Code.[7] The

[6] Now 507(a)(7), renumbered 1984.

[7] Because decisions of the Fifth Circuit that were decided on or before September 20, 1981, are binding on the Eleventh Circuit, the Waite court necessarily had to address the same issue with respect to the precedential effects of Gilbert. See, e.g., Bonner v. Prichard, 661 F.2d 1206, 1209 (11th Cir.1981).

Waite court reasoned that:

> While Gilbert concerned the old Bankruptcy Act, the new Bankruptcy Code does not furnish a principled basis for distinguishing this case. Neither statute expressly indicates whether the nondischargeability of tax debts extends to debts owed to a surety which has paid the Debtor's tax debts.

698 F.2d at 1178. We note that the majority of courts that have addressed this issue have likewise held that a surety is entitled to subrogation under Section 523(a)(1)(A).[8]

[8] See, e.g., In re Norris, 107 B.R. 592 (E.D. Tenn.1989); In re Trasks' Charolais, 84 B.R. 646 (D.S.D.1988); In re Cooper, 83 B.R. 544 (C.D.Ill.1988); In re Zoglman, 78 B.R. 213 (W.D. Wis.1987); In re Caffrey, 77 B.R. 219 (W.D.Mo.1987); In re Morris, 31 B.R. 474 (N.D.Ill.1983); In re Alloway, 37 B.R. 420 (E.D.Pa.1984); In re Hancock, 36 B.R. 709 (S.D.Ill.1984); In re Woerner, 19 B.R. 708 (D.Kan.1982); In re Gibbs, 11 B.R. 320 (W.D.Mo.1981).

The Ninth Circuit is the one notable

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exception to this majority. See, e.g., National Collection Agency, Inc. v. Trahan, 624 F.2d 906(9th Cir.1980). The Trahan court expressly refused to follow our decision in Gilbert. 624 F.2d at 907-08. The court emphasized a general policy of the Bankruptcy Code was to grant debtors a fresh start. Nevertheless, it recognized an exception to this policy for taxes because of the "overriding need to assure tax collection by government entities." Id. at 907. The court reasoned that permitting a surety to assert the rights of the State would not promote the collection of taxes, and would actually run contrary to the policy of providing debtors a fresh start. Id. As a result, the Trahan court held that California surety law conflicted with federal bankruptcy law. Id.

We disagree. Because Texas required the bond specifically to secure payment of the taxes, we think the debt paid by the surety is a tax "of the kind" specified in Section 506(a)(7). Furthermore, we do not see how the Gilbert holding interferes with the fresh start contemplated for debtors by the code:

> [a] debtor's fresh start is not overburdened by excepting a surety's subrogation claim from discharge. The debtor's fresh start is the same; he owes the same amount of nondischargeable tax debt; the only difference is whether the debtor owes the debt to the government or the surety.

In re Norris, 107 B.R. 592, 596 (E.D.Tenn.1989).

IV

Because Hartford has met its burden of proving that it is entitled to be subrogated to the nondischargeability rights of the State of Texas, the decision of the district court is

AFFIRMED.